SUPREME COURT OF THE UNITED STATES.

No. 285.

THE UNITED STATES, PLAINTIFF,
vs.
JOHN W. KIRBY, A. G. HUGHES, RICHARD MORROW, DAVID KEMPLER, AND DEWITT C. KEMPLER.

CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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Proceedings of the Circuit Court of the United States for
1 the Kentucky district, at a regular term of said court, begun and held at the Federal Court Hall, in the city of Louisville, and district aforesaid, on Monday, May 27th, A. D. 1867.

Present, Hon. Bland Ballard, Judge of the United States for the district of Kentucky.

UNITED STATES, plaintiffs,
vs.
JOHN W. KIRBY, A. G. HUGHES, RICHARD Morrow, David Kemper, and Dewitt C. Kemper, defendants.

Be it remembered, that at a term of our said court, held for its May term, 1867, to wit, on the 14th day of June, 1867, came the district attorney and filed a certiorari of the clerk of the District Court, of the record of the proceedings had in the foreegoing case in the District Court of the United States for the district of Kentucky; also the original papers referred to therein.

Ordered, that the clerk do place this case upon the docket of this court, and that it be tried in its regular order.

The certiorari above referred to is as follows, to wit:

2 United States of America, district of Kentucky, U. S. District Court at Louisville.

Be it remembered that heretofore, at a regular term of said court, held for its October term, A. D. 1866, at the city of Louisville, district aforesaid, to wit, on Saturday, January 5th, A. D. 1867, the Honorable Bland Ballard, presiding, it is ordered that the marshal do select and summon twenty-three jurors, housekeepers, good and lawful men, to appear here on the second day of our next February term to serve as a grand jury for this court.

And afterwards, to wit, at another term of our said court held for its February term, A. D. 1867, to wit, on Tuesday, February 19th, 1867, the marshal returned into court a list of the grand jurors selected and summoned by him, who, being called, the following appeared: B. N. Penick, Geo. [Geo.] Hammen, E. L. Gault, Thomas Hudson, J. J. Lightfoot, G. B. Hays, James Y. Pope, J. M. Owen, N. Bowman, Edward Morgan, M. S. Reynolds, W. A. Brown, J. S. Black, M. T. Bolt, A. B. Semple, Abner Cooper, Alex. Adams, D. W. Dyer, James Caldwell, nineteen in number.

B. N. Penick was appointed by the court the foreman, whereupon the oath was administered to him and his fellow jurors, and
3 the court having delivered to them the charge, they retired to their room.

And at a court continued and held as aforesaid, on the 27th day of February, A. D. 1867, the grand jury by B. N. Penick, their foreman, empannelled and sworn, herein returned into court the following indictment, to wit:

Indictment.

UNITED STATES
vs.
JOHN W. KIRBY, *et al.*

A true bill.

B. N. PENICK, *Foreman.*

(NOTE: The defendants on recognizance taken in another cause.)

The indictment above referred to is as follows, to wit:

UNITED STATES OF AMERICA,
District of Kentucky, sct:

In the District Court of the United States for the Kentucky district held at Louisville, on the eighteenth day of February, A. D. eighteen hundred and sixty-seven, the grand jurors of the United States of America impanneled and sworn and charge to inquire in and for the district of Kentucky, on their oaths present that John W. Kirby, A. G. Hughes, Richard Morrow, David Kemper, and DeWitt C. Kemper, late of the district aforesaid, on the first day of February, in the year of our Lord eighteen hundred and sixty-seven, at the district aforesaid, with force and arms, knowingly and wilfully, did obstruct the passage of the mail of the United States of America, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

2nd. And the jurors aforesaid, on their oaths aforesaid, do further present that the said John W. Kirby, A. G. Hughes, Richard Marrow, David Kemper, and DeWitt C. Kemper, on the first day of February, in the year of our Lord 1867, at the district aforesaid, knowingly and wilfully, did retard the mail of the United States of America, then and there lawfully in the charge and custody of one C. W. Farris, and then and there being carried by the said Farris, in the due and lawful execution of his duty as such carrier, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

3rd. And the jurors aforesaid, on their oaths aforesaid, do further present that the said John W. Kirby, A. G. Hughes, Richard Morrow, David Kemper, and DeWitt C. Kemper, on the 1st day of February, in the year of our Lord 1867, at the district aforesaid, knowingly and wilfully, did obstruct and retard the passage of one C. W. Farris, then and there being a carrier of the mail of the United States of America, duly appointed and qualified, and then and
5 there engaged in the due and lawful execution of his duty as such carrier, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

4th. And the jurors aforesaid, on their oaths aforesaid, do further

present that the said John W. Kirby, A. G. Hughes, Richard Morrow, David Kemper, and De Witt C. Kemper, on the first day of February, in the year of our Lord 1867, at the district aforesaid, knowingly and wilfully, did retard the passage of the steamboat "General Buell," which was then and there carrying the mail of the United States from the city of Louisville, in the State of Kentucky, to the city of Cincinnati, in the State of Ohio, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

B. H. BRISTOW,
U. S. Attorney.

Witnesses :
W. H. KIRBY.
Capt. R. M. WADE.
Dr. C. W. HARRIS.

And at another term of our said court, held for its May term, A. D. 1867, to wit, on Monday, May 27th, 1857, came B. H. Bristow, esq'r, district attorney, and on his motion it is ordered that the indictment pending in this court, in the above cause, be, and the same is hereby remitted to the next term of the Circuit Court for this district, to be held at the city of Louisville.

6 DISTRICT OF KENTUCKY :

I, A. J. Ballard, clerk of the District Court of the United States for the district aforesaid, do hereby certify, that the foregoing contains a full, true, and complete transcript of the record of the proceedings had in the case therein mentioned; all of which is hereby remitted to the United States Circuit Court for this district, as per order in said transcript ordered.

In testimony whereof, I hereunto set my hand and affix the seal of said court this 28th day of May, A. D. 1867.

[L. S.] A. J. BALLARD, *Clerk*,
By E. E. SETTLE, *D. C.*

And at another day of said term of our Circuit Court, to wit, on the 1st day of July, A. D. 1867, came the district attorney; came also the defendants, having Marshall & Major for their counsel.

The defendants filed their demurrer and pleas 1, 2, and 3 herein, and the district attorney filed his joinder in said demurrer, also his several demurrers to each of said pleas of defendants; and the defendants their several joinders in said demurrers.

And at a Circuit Court of the United States, begun and held at Louisville, for the district of Kentucky, on Monday, the 1st day
7 of July, in the year of our Lord one thousand eight hundred and sixty-seven.

Present, the Hon. Noah H. Swayne, and Bland Ballard.

THE UNITED STATES
vs.
JNO. W. KIRBY, A. G. HUGHES, RICHARD Morrow, David Kemper, and De Witt C. Kemper.

This is an indictment against the above-named parties for obstructing the passage of the mail of the United States, and for obstructing and retarding the passage of one C. W. Farris while lawfully engaged in carrying the mail of the United States, and is found under section 9 of the act of Congress entitled "An act to reduce into one the several acts establishing and regulating the the Post-office Department," approved March 3d, 1825.

The defendants, among other pleas, pleads that the said C. W. Farris, carrier of the mail, was arrested by them while carrying the mail of the United States, under and by virtue of a bench-warrant, which issued from the Gallatin County Circuit Court of the State of Kentucky, commanding the said defendant, J. W. Kirby, who was then the sheriff of said county, to arrest the said C. W. Farris and bring him before the judge of said court, to answer an indictment for murder, then pending against him in said court, and that the other defendants were summoned as a posse to aid the said sheriff in
8 making the arrest, under and by virtue of said warrant.

To which pleas the attorney for the United States filed a general demurrer.

This case coming on to be argued at this term, it occurred as questions:

1st. Whether the arrest of said mail carrier by the defendants, under and by virtue of the bench-warrant issued from a court of the State of Kentucky, was, under the circumstances, an obstruction of the mail, within the meaning of mentioned act of Congress.

2nd. Whether said arrest was obstructing or retarding the passage of a carrier of the mail, then and there carrying the same, within the meaning of said act of Congress.

On which questions the opinions of the judges were opposed.

Whereupon, on motion of the attorney of the United States, that the points on which the agreement hath happened may, during the term, be stated under the directions of the judges, and certified, under the seal [the seal] of the court, to the Supreme Court, to be finally decided; it is ordered that the foregoing state of the pleadings, with the facts and questions thereupon arising, be certified according to the request of the said attorney.

The demurrer of defendants and joinder of district attorney above referred, is as follows, to wit:

9 The United States Circuit Court for the district of Kentucky.

UNITED STATES
vs.
JNO. W. KIRBY *et al.*

UNITED STATES OF AMERICA:

Now come the defendants named in the indictment, and they say,

as to the matters and things charged in the several counts of said indictment, actio non, &c., because they say the same are not sufficient in law to sustain judgment and to require them to plead further; and of this they pray the judgment of this court, &c., &c.

MAJOR & MARSHALL, *P. D.*

And the district attorney likewise.

B. H. BRISTOW.

Pleas 1, 2, and 3, and demurrers thereto, &c., above referred to, are as follows, to wit:

United States Circuit Court for the district of Kentucky.

Plea 1.

UNITED STATES
vs.
JNO. W. KIRBY *et al.*

UNITED STATES OF AMERICA:

And for plea herein the defendants say to the several counts of said indictment, that [that] they are not guilty in manner and form as charged therein; and of this they put themselves upon the country.

MAJOR & MARSHALL, *P. D.*

10 UNITED STATES
vs.
JNO. W. KIRBY *et al.*

THE UNITED STATES OF AMERICA,
6th Circuit and District of Kentucky:

The district attorney comes and says the United States ought not to be precluded by anything in defendants' 1st plea contained, because he says the same is not good and sufficient in law. Wherefore he prays judgment.

B. H. BRISTOW.

And the def'ts likewise.

MARSHALL & MAJOR, *P. D.*

United States District Court for the district of Kentucky.

Plea No. 2.

UNITED STATES
vs.
JNO. W. KIRBY &c.

UNITED STATES OF AMERICA:

And for further plea herein, especially as to the second and third counts, defendants say that the carrier of the mail was not obstructed

in the passage with the mail farther than was necessary to arrest one C. W. Farris, who was indicted in the Gallatin Circuit Court, in the State of Kentucky, in two cases, for the crime of murder, and for whose arrest a bench-warrant had been issued by the judge, and an order issued thereon by the clerk of the court, and came to the hands of defendant Kirby, who was at the time sheriff of Gallatin county aforesaid; and defendants say, that said Farris was arrested in obedience to said writ by said Kirby, who was accompanied by the other defendants as a posse, summoned according to law to assist in the execution of said writ of arrest; and they say no more force
11 was used than was necessary to effect said arrest, and no detention of the mail was caused thereby at the time when said arrest was made, and no obstruction to the passage of the carrier of the mail was knowingly offered, nor was any retarding said passage father than was a necessary consequence of the execution of said arrest, and this they are advised they had a right to do; and they pray it may be enquired of, &c., and that they may have their costs and be hence dismissed, &c., &c.

MAJOR & MARSHALL, *P. D.*

United States of America, 6th circuit and district of Kentucky.

UNITED STATES
vs.
JNO. W. KIRBY *et al.*

The district attorney comes and says the United States ought not to be precluded by any thing in defendant's plea No. 2, contained, because he says the same is not good and sufficient in law. Wherefore, he prays judgment.

B. H. BRISTOW.

And the defendants likewise.

MAJOR & MARSHALL, *P. D.*

United States Circuit Court for the district of Kentucky.

Plea No. 3.

UNITED STATES
vs.
JNO. W. KIRBY *et al.*

UNITED STATES OF AMERIA:

Now come the said defendants, John W. Kirby, A. G. Hughes,
12 David Kemper, De Witt C. Kemper and Richard Morrow, and for further plea in this behalf, as to the 3rd count says: That at the September term, 1866, of the Gallatin Circuit Court, in the State of Kentucky, which court is one of competent jurisdiction, the Grand Jury empanneled and sworn, in said court, for the body of said county,

returned, on oath, as true, two indictments against one Dr. C. W. Farris, numbered Nos. 246 and 247, for murder, into said court, and that afterwards, to wit, the judge of said court ordered peremptory bench warrants to issue on said cases, commanding the arrest of the person of said Farris; and thereupon the clerk of said court, did issue, and place in the hands of the sheriff, of said county, a bench warrant, or order of arrest, commanding him to arrest Dr. C. W. Farris, and that he be brought before the judge of the Gallatin Circuit Court, to answer said indictments for murder, returned into said court, or if the said court be adjourned, that the officer effecting the arrest should deliver him into the custody of Gallatin county. Said warrant was dated the day of September, 1866. and came to hands of the defendant; John W. Kirby, was then sheriff of Gallatin county, aforesaid, on the day last named, and was returned by him on the day of Sept'r, 1866. the same day it was executed, by arresting the said Farris, and delivering him to the jailor of Gallatin county;

13 and the other and all the def'ts say, that the others, than the said Kirby, were summoned as a posse comitatus in said county of Gallatin, to assist said Kirby, the sheriff of said County, in effecting the arrest, and were compelled by the law of the State of Ky., and under the express order of the said judge of the Gallatin Circuit Court to render obedience to summons; and the defendants say, they entered the steamboat Buell to effect said arrest, only by virtue of the order and summons aforesaid, and only used such force as was necessary to effect the same, and this they did without any interest or purpose to obstruct or retard the mail, or the passage of the steamer Buell, as they had the right to do; and the def'ts further say, that the passage of the U. S. Mail steamer and mail, was not obstructed or retarded by their act, nor was she detained by their act or retarded longer than was necessary to land the passengers, and put off, and put on the mail; and that if she was in any retarded or detained, it was not in consequence of the execution of a legal writ as aforesaid in the hands of the said Kirby, &c., as aforesaid, to be executed by the arrest of Farris, at the time when he, as aforesaid, was to be arrested, but was the act of the officers of the boat; and this they pray may be enquired of, and whether they be required further to justify, &c.

MAJOR & MARSHALL, *P. D.*

UNITED STATES
vs.
JNO. W. KIRBY *et al.*

UNITED STATES OF AMERICA:

14 *6th Circuit and district of Kentucky:*

The district attorney comes and says, the United States ought not to be precluded by any thing in defendant's 3rd plea contained, because he says the same is not good and sufficient in law.

Wherefore he prays judgment.

B. H. BRISTOW.

And the def'ts likewise.

MAJOR & MARSHALL, *P. D.*

UNITED STATES OF AMERICA,
District of Kentucky, sct:

I, A. J. Ballard, clerk of the Circuit Court of the United States for the district aforesaid, do certify that the foregoing 14 pages, this included, contains a true and complete transcript of the record of the proceedings had in the case therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Louisville, this 10th day of August, A. D. 1867.

[SEAL.]

A. J. BALLARD, *Clk.*
By SAMUEL B. CRAIL, *D. C.*

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

THE UNITED STATES
vs.
JOHN W. KIRBY AND OTHERS. } No. 137.

Certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR UNITED STATES.

This is an indictment under the 9th section of the act of March 3, 1825, entitled "An act to reduce into one the several acts establishing and regulating the Post Office Department." It contains four counts, the first and second of which charge that the defendants did, on the 1st of February, 1867, knowingly and wilfully obstruct and retard the passage of the mail, etc.; the third count charges them, at the same time, with knowingly and wilfully obstructing and retarding the passage of one C. W. Farris, a mail carrier, while engaged in the performance of his duty, etc.; and the fourth count charges them with knowingly and wilfully retarding, at the same time, the passage of the steamboat "General Buell" while employed in carrying the mail, etc. (Record, pp. 2 and 3.)

The defendants, among other things, pleaded specially that at the September term, 1866, of the Gallatin Circuit Court, in the State of Kentucky, two indictments were found against the said C. W. Farris for murder; that, by direction of the court, a bench warrant was thereupon issued and put into the hands of John W. Kirby, one of the defendants, who was then sheriff of Gallatin county, commanding him to arrest the said C. W. Farris; that the latter was arrested in obedience to said writ by said Kirby, who was accompanied by the other defendants as a posse, lawfully summoned to assist in the execution of the writ; that the defendants entered the steamboat "Buell" to effect the arrest, and only used such force as was necessary for that purpose, etc. To all which the attorney for the United States put in a general demurrer. (Record, pp. 5, 6 and 7.)

Upon the case afterwards coming on to be argued before the court below, the following questions arose, on which the judges were divided in opinion, and which are by them certified to this court, viz:

1. Whether the arrest of said mail-carrier by the defendants, under and by virtue of the bench warrant issued from a court of the State of Kentucky, was, under the circumstances, an obstruction of the mail, within the meaning of the aforementioned act of Congress.

2. Whether said arrest was obstructing or retarding the passage of a carrier of the mail, then and there carrying the same, within the meaning of said act of Congress. (Record, p. 4.)

FIRST POINT.

The act of Congress under which this indictment is framed provides:

SEC. 9. "That, if any person shall knowingly and wilfully obstruct or retard the passage of the mail,

or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction, for every such offence pay a fine not exceeding one hundred dollars; and if any ferryman shall, by wilful negligence, or refusal to transport the mail across the ferry, delay the same, he shall forfeit and pay, for every ten minutes that the same shall be so delayed, a sum not exceeding ten dollars."—(4 Stat., 104.)

SECOND POINT.

The weight of authority, upon the questions here involved, is decidedly in favor of the position of the government, that the arrest of the carrier of the mail under the warrant was an obstruction of the mail and of the carrier thereof, within the intent and meaning of the act of Congress.

UNITED STATES *v.* BARNEY.
3 American Law Journal, 128.

This case was decided by Judge Winchester, in Maryland district, in 1810. The indictment was under act of March 2, 1799, (1 Stat., 733,) which is in the same words as the act of 1825, section 9. The detention there was by an inn-keeper, under a lien for the keep of the horses employed in carrying the mail; and the court held that the defendant was not justified.

Judge Winchester said:

"The statute is a general prohibitory act. It has introduced no exceptions. The law does not allow any justification of a *wilful* and *voluntary* act of obstruction to the passage of the mail," etc.

(3 Hall's Law Journal, 131.)

UNITED STATES *v.* HARVEY.
8 Law Reporter, 77.

The indictment, in this case, was under the act of 1825, and was against a constable for arresting the mail-carrier under a warrant in an action of trespass. Chief Justice Taney held that the mere *serving* of the warrant would not render the party liable; yet "if by serving the warrant he *detained* the carrier, he would then be liable."

The late Chief Justice further said:

"We do not construe the term 'wilfully' in the same sense as the traverser's counsel. If the traverser, by serving the warrant, detained the carrier, then he '*wilfully*' detained him in the sense that word is used in the act of Congress."

To the contrary of these decisions, perhaps, is the opinion of Mr. Justice Washington in—

United States v. Hart.

1 Peters, C. C. R., 390.

In that case it was held that the act of Congress was not to be construed so as to prevent the arrest of the driver of a carriage in which the mail is carried, when he is driving through a crowded city at an improper rate.

THIRD POINT.

The word "*wilfully*" in the act of 1825 means no more than *intentionally* or *designedly*—

1 Bishop on Criminal Law, 422.

2 Russell on Crimes, 594, 597, 631.

Commonwealth *v.* Bradford, 9 Metcalf, 270.

FOURTH POINT.

The writ of no State court can properly run into the sphere of the exclusive dominion of the government of the United States; and persons engaged in carrying the mail are within the sphere of that do-

minion while in actual custody of the mail and actually employed in the carriage of it.

This court has said in most emphatic terms:

"The sphere of action appropriated to the United States is as far beyond the reach of judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye."

Ableman v. Booth, 21 How., 516.

If, as this court has decided, no State court can, by its process, take a *thing* in the lawful custody of an executive officer of the United States out of the possession of that officer, it would seem that no State process can lawfully take an *officer* of the United States away from a thing, such as the mail, of which he is in the lawful custody and possession for the purpose of exercising one of the governmental functions of the United States.

To obstruct such an officer, under such circumstances, is to obstruct the government of the United States; and this cannot lawfully be done by any State.

Slocum *v.* Maybery, 2 Wh., 9, 10, 12.
Harris *v.* Dennie, 3 Pet., 304.
Taylor *v.* Carryl, 20 How., 596.
Freeman *v.* Howe, 24 How., 458.

E. R. HOAR,
Attorney General.

J. HUBLEY ASHTON,
Ass't Att'y Gen'l.